SUPREME COURT, U. S

JAN 22 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-905

Hennepin Broadcasting Associates, Inc., a Minnesota corporation, d.b.a. Radio Stations KTCR/AM and KTCR/FM,

Petitioner,

vs.

American Federation of Television and Radio Artists, a national labor association, American Federation of Television and Radio Artists Twin City Local, a Minnesota labor association, Hal W. Newell, individually and as Executive Secretary of American Federation of Television and Radio Artists Twin City Local, James T. Hansing, Gregory C. Peterson, John R. Bortnem, Gregory B. Ellsworth,

Respondents.

PETITION FOR WRIT OF CERTIORARI

JAMES MALCOLM WILLIAMS
212 West Franklin Avenue
Minneapolis, Minnesota 55404
Attorney for Petitioner

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PETITION FOR WRIT OF CERTIORARI

Comes now your Petitioner and respectfully shows the Court pursuant to Rule 23 of the Supreme Court of the United States:

(a) That the following decisions were made:

(1) Memorandum Opinion of District Court of Hennepin County, Fourth Judicial District, State of Minnesota, limiting non-pre-empted area to personal "intimidation

and threats of violence" and citing as authority decisions of this Court that are confusing, inconsistent and lack a definite or even rational standard for delineating the principles and are of Congressionally intended and constitutionally limited pre-emption of law (State and Federal, Criminal and Civil) by the National Labor Relations Act. Title 28 *U.S.C.* (Addendum).

(2) Decision of Supreme Court of the State of Minnesota filed October 25, 1974. Judgment of said Court entered November 29, 1974 determining in effect that all laws both State and Federal except those that "relate directly to violent or coercive conduct which threatens physical abuse to individuals and also threatens the public order", and citing the same cases as in the District Court Memorandum and compounding the confusion, uncertainty and inconsistency of the law by adding to *United Construction Workers, et al. v. Laburnum Construction Corp.* (1954), 347 U.S. 656, *Auto Workers v. Wisconsin Board* (1956), 351 U.S. 266, *United Automobile Workers v. Russell* (1958), 356 U.S. 634, and *San Diego Bldg. Trades Council, et al. v. Garmon* (1959), 359 U.S. 236 as authority for such unconstitutional and congressionally intended rigidity. *Youngdahl v. Rainfair, Inc.* (1957), 355 U.S. 131 (Appendix B - pp. 8-21).

N.B. Both of the above Minnesota State decisions extend the preemption doctrine so as to in effect abrogate all law, civil, criminal, tort, contract, etc., other than law within that narrow area above-delineated, whether or not there is a remedy in the National Labor Relations Act and whether or not the activities destroy federally licensed and regulated radio broadcasting or are acts which threaten the public's interest and rights to such broadcasts and

such could reasonably cause the petitioner's Federal Communications license to be suspended or revoked. (1974) — Minn. —, 223 N.W.2d 391. (Appendix A attached.)

(i) Minnesota Supreme Court Decision No. 90. Filed October 25. 1974. Revised and Entered November 29. 1974.

(ii) Not applicable.

(iii) Jurisdiction is conferred on this Court by Section 1257 of Title 28, *U.S.C.*, Subsection (3):

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari . . . where the validity of a . . . statute of the United States is drawn in question . . . or . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . statutes of . . . commissions or authority claimed under the constitution . . ."

(c) Questions presented for review are:

Whether or not the area of preemption of State and Federal Civil and Criminal Law by the National Labor Relations Act Circumscribed by the Minnesota Supreme Court below is contrary to the decisions of the United States Supreme Court interpreting the National Labor Relations Act; and/or are contrary to the said statute and congressional intent contained therein; and/or deprive the petitioner herein of his constitutional privileges and immunities, rights, equal protection of the law, due process, jury trial, and freedom from contract impairment as embodied in the United States Constitution

Or stated another way: Is absolute immunity from all law granted to those who purport to act under the cloak of a labor union or dispute except in the narrow area delineated by the Minnesota Supreme Court?

Or focusing on one area of the immunity granted by the Minnesota Appellate Court of great public as well as private concern:

Are those who willfully and in bad faith destroy an F.C.C. Licensed and regulated in the public's interest, radio (or television) station's signal granted absolute immunity by the National Labor Relations Act from State and Federal law, civil and criminal, if such acts are committed by a conspiratorial group glossed with a union sponsor and as part of an alleged union matter?

(d) That the constitutional provisions and statutes involved are:

United States Constitution, Amendments XIV, VII, Article I, Section 10, Article IV, Section 2 and Amendment V:

Amendment XIV: ". . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens for the United States nor shall any state deprive any person of life, liberty of property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VII: ". . . Where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Article I, Section 10: "No state shall . . . impair (ing) obligation of contract."

Article IV, Section 2: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Amendment V: "No person shall . . . be deprived of . . . liberty or property without due process of law."

Federal Statutes: Title 29 United States Code; Title 47 United States Code:

Title 29 United States Code: National Labor Relations Act. Preemption doctrine implied as there are no specific provisions. See decisions of this Court cited herein.

Title 47 United States Code: The spirit of the Federal Communications Act and Regulations promulgated thereunder by the Commission, too voluminous to include and are merely declaratory of the public's rights and interest in broadcasting.

Minnesota Statutes Annotated 609.595 Damage to Property.

"Subdivision 1. Aggravated criminal damage to property. Whoever intentionally causes damage to physical property of another without the latter's consent may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $5,000, or both, if:

(2) The property damaged belongs to a public utility or a common carrier and the damage impairs the service to the public rendered by them;"

(e) Concise statement of facts.

The respondents conspired to maliciously and in bad faith destroy the petitioner's radio signals contrary to petitioner's responsibilities under its license and applicable

Federal Communications Commission Regulations and the Federal Communications Act as part of an attempt to organize federally licensed announcer-engineers at two small radio stations in the Metropolitan Twin City area (see Appendix B, pp. 4-7). Those involved were substantially all who had authority from the F.C.C. to operate (i.e. the electronic signals) the stations.

Said actions are arguably criminal under Minnesota Law as well as violative of other legal principles such as malicious interference with contract and business advantage (e.g. F.C.C. license) as well as advertisers. All allegations of the complaint (Appendix B, pp. A1-A8) are considered true for purposes of this Petition as judgment on the pleadings is the essential issue, i.e. what constitutes a cause of action? (see District Court's Law Memorandum—Addendum).

(f) The key federal questions were originally raised by petitioner in opposition to the motion by the defendant-respondents below for a summary judgment under the *Garmon* case, cited *supra* (see Appendix B, pp. A-49 to A-59) in the lower court by oral argument and in the appellant's brief to the Minnesota Supreme Court (see Appendix B, pp. 1-22). They were passed on by the lower court by order (Appendix B, pp. A-59-60, and Addendum) and by the decision of the Minnesota Supreme Court appended hereto.

(g) This is a compelling situation in which a most important Federal question has been decided by a state court contrary to meaningful precedent and vital Federal Constitutional rights.

Imagine a powerful labor leader ordering all the radio and television stations of America off the air without re-

sponsibility because he says there is a union matter! The Minnesota Court has in effect delivered that great destructive power to him.

(h) The obtuse language of *Garmon*, cited *supra*, has caused lower courts, lawyers, labor leaders and others throughout the country to conclude that the National Labor Relations Act has created a privileged class immune for all practical purposes from the law, either federal or state, civil or criminal except laws involving bodily harm. That is a ridiculously narrow definition of labor "peace" and was not this Court's decision in *Wisconsin, Russell, Laburnum* or *Rainfill*, cited *supra*. We are indeed in need of the late Justice Frankfurter's "delphic" oracles if this Court refuses to act immediately to end what could most euphemistically be called legal confusion.

Justice Frankfurther stated relative to the preemption doctrine and the National Labor Relations Act that:

> "*The statutory implications, concerning what has been taken from the states and what has been left to them are of a delphic nature to be translated into concreteness by the process of litigation elucidation.*" (*San Diego Bldg. Trades Council v. Garmon*, cited *supra*, at P. 241). (Emphasis supplied.)

The people of the United States and this petitioner certainly agree with the need for "concreteness" and "elucidation", but categorically reject "delphic" or Divine Revelation or any other "Divining Rod" technique for determining law!

To say that *Garmon*, cited *supra*, created more problems in labor relations than *Roth* (*Roth v. United States*, 354 U.S. 76, 775 S. Ct. 1304, 1 L. Ed.2d 1498) did in the law of obscenity is certainly not an exaggeration.

Russell, Wisconsin, Laburnum, Rainfill, and *Garmon,* cited *supra,* should be synthesized by this Court into an intelligible standard of law which can be understood and respected as a vehicle of fair labor relations within the framework of constitutional guarantees. This Court has the inherent power and intelligence to do this. It is long overdue. The people are entitled to be governed by rational standards not the incantations of the Sun God Appollo (delphic).

Respectfully submitted,

JAMES MALCOLM WILLIAMS
Attorney for Petitioner
212 West Franklin Avenue
Minneapolis, Minnesota 55404

ADDENDUM

MEMORANDUM

It appears beyond doubt that the plaintiff is subject to the jurisdiction of the National Labor Relations Act and the National Labor Relations Board. For that reason, defendants argue that the allegations made by plaintiffs have been pre-empted by federal law. However, the pre-emption of the federal act has not been extended to "intimidation and threats of violence." See United Workers v. Laburnum Corp., 347 U.S. 656 (1953), Auto Workers v. Wisconsin Board, 351 U.S. 266 (1955), Automobile Workers v. Russell, 356 U.S. 634 (1957), and San Diego Unions v. Garmon, 359 U.S. 236 (1958).

The Court has issued no temporary injunction here because the affidavits in support of the motion for such injunction are not, in the Court's mind, sufficient to invoke such remedy.

The actions against all defendants except Mr. Ellsworth have been dismissed upon defendants' motion for summary judgment because the affidavits in support of such motion and affidavits in opposition to said motion do not, in the opinion of this Court, constitute factual matters sufficient to overcome the pre-emption of the federal law.

Defendant Ellsworth is in a different position than the other defendants in that there are direct allegations made as to his conduct which, if proven in a trial, would seem to be the proper vehicle to give the state jurisdiction. The Court has not issued a temporary injunction against Mr. Ellsworth for the reason that the acts alleged are past and the Court does not deem it likely that such actions would continue.

D.K.A.

No. 90 Hennepin County

Per Curiam
Dissenting, Scott, J.
Took no part, Otis, J.,
Knutson, J.

Hennepin Broadcasting Associates, Inc., d.b.a. Radio Stations KTCR/AM and KTCR/FM,

Appellant,

44587 vs.

American Federation of Television and Radio Artists, et al,

Endorsed
Filed October 25, 1974
John McCarthy, Clerk
Minnesota Supreme Court

Respondents,

Gregory B. Ellsworth,

Defendant.

Heard before Kelly, MacLaughlin, and Yetka, JJ., and considered and decided by the court en banc.

O P I N I O N

PER CURIAM.

Plaintiff, Hennepin Broadcasting Associates, Inc., commenced this action to remedy the alleged malicious commission of intentional torts and malicious bad-faith breach of contract by defendants. The complaint sought damages and injunctive relief, alleging that defendants, American Federation of Television and Radio Artists (AFTRA) and certain named individuals either associated with AFTRA or employed by plaintiff, terminated the broadcasting ability of plaintiff's stations by destroying their electronic signals, acted contrary to Federal Communications Commission law, interfered with plaintiff's contractual obligations, engaged in an illegal wildcat strike, and threatened visitors and employees. Plaintiff first filed a motion for a temporary restraining order which was denied. Plaintiff then filed a motion for a temporary injunction. Defendants filed a motion for summary judgment. Upon the complaint and the affidavits filed by both parties, the trial court entered an order granting defendants'

motion for summary judgment with respect to all defendants except Gregory B. Ellsworth,[1] on the theory that the activities complained of were preempted by the National Labor Relations Act (NLRA), and denying plaintiff's motion for a temporary injunction. Plaintiff appeals from that order. We affirm in part and reverse in part.

Plaintiff, a Minnesota corporation engaged in the operation of an FM radio station in Minneapolis and an AM radio station in New Hope, employs several persons who regularly appear on the air and perform certain engineering functions at the two radio stations. In early June 1972, two of plaintiff's announcer-engineers contacted the Twin Cities local of AFTRA, a labor organization representing employees of television and radio broadcasting companies, presumably with the intent of seeking AFTRA to act as bargaining agent for plaintiff's employees. Shortly thereafter, Hal Newell, AFTRA executive secretary, met with most of plaintiff's announcer-engineers, and a number of them signed applications for membership in AFTRA.

On June 15, 1973, AFTRA representative Newell sent a letter by certified mail to plaintiff claiming a majority of plaintiff's employees were members of AFTRA and demanding recognition as bargaining agent for the employees. On the same day, Newell filed a petition with the Minneapolis Regional Office of the National Labor

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[1] The trial court denied the motion for summary judgment with respect to Ellsworth because the court felt that there were allegations made as to his conduct which, if proven in a trial, could properly give rise to a remedy in the state courts.

Relations Board (NLRB) asking for an election among the on-the-air personnel to determine whether AFTRA would be certified as their collective-bargaining agent.

Defendants contend that after receiving Newell's letter on June 18, 1973, plaintiff questioned its employees concerning union activity. On June 21, 1973, plaintiff discharged announcer Richard Carey who, along with Ellsworth, had led efforts to organize other announcer personnel and persuade them to join AFTRA. On June 21, following Carey's discharge, the employees decided to strike. On June 22, they met with AFTRA representative Newell and AFTRA's counsel and reaffirmed their decision to strike and picket plaintiff's radio stations. At the same time AFTRA filed an unfair labor practice charge with the NLRB.

At approximately 5 p. m., on June 22, 1973, the two employees who were then on the air left their announcing booths and joined other employees in picketing the two stations. Plaintiff contends that this action, which was done without prior notice to it, was not a good-faith union activity, but was a conspiracy to force plaintiff to change managers. Plaintiff also contends that while engaged in the strike defendants undertook a series of actions including threats, intimidations, acts of violence, and interference with contractual relationships which gave rise to this action.

The issue for our consideration is whether the trial court was correct in deciding that the activites complained of by plaintiff are preempted by the NLRA.

The case which sets the guidelines for our decision is San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, 3 L. ed. 2d 775 (1959). In that case, the United States

Supreme Court held that an activity which arguably is either protected by § 7 of the NLRA, 29 USCA, § 157, or constitutes an unfair labor practice under § 8 of the NLRA, 29 USCA, § 158, is preempted and may not be regulated by the states except where violence or coercive conduct is involved which presents imminent threats to the public order. The court took this position because it felt that Congress entrusted administration of the labor policy for this country to the NLRB. Therefore, allowing the states to freely regulate such conduct would involve "too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U. S. 244, 79 S. Ct. 779, 3 L. ed. 2d 782.

The trial court was clearly aware of this standard and considered it in reaching its decision. In denying the motion for a temporary injunction and granting the motion for summary judgment, the trial court specifically found that the affidavits filed by plaintiff were insufficient to overcome Federal preemption. In reaching this decision, the trial court cited three leading cases in which incidents were determined to be sufficiently provocative to permit state jurisdiction in labor-related matters. In these cases, the United States Supreme Court held that the compelling state interest in maintaining domestic peace should not be overridden in the absence of clearly expressed congressional direction. See, United Const. Workers v. Laburnum Const. Corp. 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 (1954); United Auto Workers v. Wisconsin Employment Relations Board, 351 U. S. 266, 76 S. Ct. 794, 100 L. ed. 1162 (1956); Automobile Workers v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. ed. 2d 1030 (1958). See, also, Youngdahl v. Rainfair, Inc. 355 U. S. 131, 78 S. Ct. 206, 2 L. ed.

Plaintiff contends that defendants' actions in the present case bring it squarely within the exception in Garmon for cases involving acts of coercion and violence. In support of its contention, plaintiff asserts that defendants (1) conspired to maliciously and unlawfully terminate the broadcasting of plaintiff's stations; (2) tortiously interfered with plaintiff's individual employment contracts with its employees; (3) interfered with plaintiff's contracts with advertisers and engaged in an unlawful secondary boycott; (4) unlawfully threatened visitors and employees; and (5) carried out acts of violence against plaintiff's employees.

We have carefully reviewed all of the affidavits in this case which relate to the activities complained of by plaintiff and have determined that with the exception of allegations set forth in two of the affidavits, relating to a bomb threat against the stations' program director and the firing of bullets into the car of one of the station engineers, the decision of the trial court that the remaining activities are preempted by Federal law as to all defendants except Ellsworth should be affirmed. With respect to the affidavits alleging a bomb threat against the program director and the firing of bullets into the car of one of the station engineers, however, we are of the opinion that this alleged conduct falls directly within the exception in Garmon for cases involving violent or coercive conduct which presents the threat of physical abuse to individuals or which presents imminent threats to the public order. At the time that the affidavits alleging the incidents were filed, there was no concrete evidence linking these acts to any of the defendants. Because summary judgment was granted to defendants in this case before the discovery process had begun,

plaintiff was never permitted to determine whether evidence existed to substantiate these claims and connect defendants with them. We believe that the granting of summary judgment under these circumstances was premature.

It may very well be that plaintiff will be unable to produce sufficient evidence to withstand a later motion for summary judgment made after all discovery has been completed relative to these claims. However, because the claims relate directly to violent or coercive conduct which threatens physical abuse to individuals and also threatens the public order, they should be fully considered by the state court. Therefore, we affirm the decision of the trial court except so far as it pertains to plaintiff's claims of bomb threats against the program director and the firing of bullets into the car of a station engineer. We reverse and remand the case for further consideration of those claims. We also affirm that part of the trial court's decision which denied the motion for summary judgment with respect to defendant Ellsworth. We agree with the trial court that there were allegations made as to his conduct which, if proven, properly give rise to a remedy in the state courts.

Affirmed in part and reversed in part.

SCOTT, Justice (dissenting).

I strongly dissent from the majority opinion and would reverse the trial court's determination that the alleged activities of defendant Ellsworth were subject to state regulation under San Diego Bldg. Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, 3 L. ed. 2d 775 (1959). While it is clear that under the Garmon doctrine state courts may properly entertain actions involving coercion or violence on the part of a labor organization and individuals even if Federal labor relations statutes apply to the situation, the allegations in the appellant's complaint, that "the defendants and each of them have been * * * threatening visitors and employees," considered in the light most favorable to appellant would constitute unfair labor practices under the National Labor Relations Act and would therefore be preempted by that act. Until appellant can be more specific in its complaint about the bomb threat or the bullet holes being fired into engineer Charles Engel's car, which incidents were alleged in affidavits, we should not stretch the Garmon case to allow an action to proceed when it appears clearly preempted by Federal statutes.

This court should strictly construe the Garmon case and not allow state jurisdiction where the complaint merely makes sweeping attacks on various activities during labor organizing:

> "* * * When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. 245, 79 S. Ct. 780, 3 L. ed. 2d 783.

The employees have a right to organize for the purpose of bargaining collectively. There is seldom a situation in this

field where there are not charges and countercharges as there are in this case, whether true or not.

In Garmon, the court was faced with substantially similar activity to that alleged here, i. e., the exertion of pressures upon customers and suppliers to discontinue dealings with the respondents there. The court found the possibility that § 7 or § 8 of the National Labor Relations Act would encompass such activity existed and therefore displaced state court jurisdiction. Such conduct, the court further concluded, was not of such a nature as to invoke the exception of the "compelling state interest." 359 U. S. 247, 79 S. Ct. 781, 3 L. ed. 2d 784. Such reasoning is definitely applicable here.

Without present imminent threats to the public order, there seems no reason for joint jurisdiction and duplicate efforts involving the same allegations merely because the plaintiffs decided to bring such an action. It would seem a step backward to have the court, at this point in time, reenter the field of labor disputes of this type and dimension which have so long, and properly so, been preempted by the National Labor Relations Act. It seems unnecessary. I would sincerely suggest, from the standpoint of commonsense, that this matter be pursued under uniform Federal standards.

MR. JUSTICE OTIS and MR. JUSTICE KNUTSON took no part in the consideration or decision of this case.